BENCH BRIEFS

By Elaine Colavito

SUFFOLK COUNTY SUPREME COURT

Honorable W. Gerald Asher

Motion pursuant to CPLR §603 severing the causes of action asserted; although deciphering which accident resulted in a particular injury or whether an ailment was a pre-existing condition may prove difficult, the causes of action asserted against the defendants presented common factual and legal issues.

In *Paul J. Rocchio v. Nicolo Meola and Joyce B. Seman,* Index No.: 3217, decided on July 1, 2015, the court denied the defendant, Joyce B. Seman's motion pursuant to CPLR §603 severing the causes of action asserted against her. The action was brought to recover damages for personal injuries allegedly sustained by the plaintiff as a result of two separate motor vehicle accidents. In support of her motion, moving defendant argued that the motor vehicle accidents were separate and distinct events and the alleged resulting injuries were isolated and unrelated. She further asserted that she would be severely prejudiced by a single trial because it would be impossible for defendant's physicians to accurately testify since the damages were lumped together and further that if both accidents were tried together, there was a likelihood of juror confusion.

In opposition, co-defendant and plaintiff asserted that the motor vehicle accidents resulted in interrelated injuries and the exacerbation of these and prior injuries. They also argued that severing the actions would be a waste of judicial resources and could potentially result in inconsistent verdicts.

In denying the application, the court noted that where complex issues were intertwined, albeit in technically different actions, it would be better not to fragment trials, but to facilitate one complete and comprehensive hearing and determine all the issues involved between the parties at the same time. Fragmentation increases litigation and places an unnecessary burden on the court facilities by requiring two separate trials instead of one. Severance is further inappropriate where there are common factual and legal issues and judicial economy and concerns for inconsistent verdicts. Here, although deciphering which accident resulted in a particular injury or whether an ailment was a pre-existing condition may prove difficult, the causes of action asserted against the defendants presented common factual and legal issues. Any concerns regarding potential juror confusion or special requests for charge may be properly addressed at the trial.

Elaine Colavito

Honorable Paul J. Baisley, Jr.

Motion for summary judgment granted; complaint dismisses; defendant was an out-of-possession landlord that was not contractually obligated to maintain the premises, that it did not endeavor to maintain the premises and that it did not owe plaintiff a duty by virtue of applicable statute of regulation.

In *Timothy Kapler v. Sandy Beech, Inc., and Citgo Petroleum Corporation,* Index No.: 63312/2014, decided on March 6, 2015, the court granted the motion for summary judgment pursuant to CPLR §3212 and dismissing the complaint against defendant, Sandy Beech, Inc. Defendant, Sandy Beech, Inc. filed the instant motion on the grounds that it was an out of possession landlord that had no obligation to the plaintiff. In dismissing the complaint, the court noted that moving defendant submitted an affidavit of its principal, John Bauer and a copy of the lease agreement with its tenant, Global Gas Corp., and a subsequent lease assignment of the lease to Babylon Asset Management Corp. The court found that these documents established defendant's prima facie entitlement to summary judgment with respect to liability to plaintiff by demonstrating that defendant was an out-of-possession landlord that was not contractually obligated to maintain the premises, that it did not endeavor to maintain the premises and that it did not owe plaintiff a duty by virtue of applicable statute of regulation.

Honorable Ralph T. Gazzillo

Plaintiff's causes of actions dismissed; language of restriction was simple, plain and specific and its import was unequivocal.

In *Marshytern, LLC v. Thomas P. Tupper,* Index No.: 45735/2010, decided on June 26, 2015, the court dismissed plaintiff's causes of action. In rendering its decision, the court noted that both parties owned contiguous plots, referred to as Lot 2 and Lot 3. Lot 3 was burdened with restrictions, which in relevant part were as follows: "no additional shrubbing shall be placed on LOT 3 without the prior approval of the owner of LOT 2, it being the intention of the DECLARANTS under this paragraph and the specific limitations contained in paragraph 2 hereof to retain open scenic views to the north and west for the benefit of LOT 2." The plaintiff's submissions stated that the restrictive language of the covenants was ambiguous and that the vantage point for open scenic views was not specified and that it failed to define shrubbing.

The other claim was that the defendant sought to extend the restrictive covenant beyond the clear meaning of its terms. In dismissing plaintiff's claims, the court noted that the more appropriate, proper focus and the pivotal point of this matter should be the initial, clear language of the paragraph under examination, "[n]o additional shrubbing shall be placed on LOT 3 without prior approval of the owner of LOT 2…" The court noted that the language was simple, plain and specific and its import was unequivocal. There was no ambiguity and no need for research. Accordingly, the court concluded, the meaning was unambiguous as it was obvious: no more shrubs or trees without Lot 2's owner's permission. According, plaintiff's causes of actions were dismissed.

Honorable Joseph C. Pastoressa

Pre-answer motion to dismiss the complaint for failure to state a cause of action denied; court must determine whether, accepting the facts as alleged in the complaint as true and according to the plaintiff, the benefit of every favorable inference, those facts fit within any cognizable legal theory.

In *Lighthouse Vacation Properties and Ali Beqaj v. Jeffrey Kessler and Denise Brodey,* Index No.: 824/2014, decided on September 3, 2014, the court denied defendants' pre-answer motion to dismiss the complaint for failure to state a cause of action. The court noted that on a motion to dismiss a complaint under CPLR §3211(a) (7), the test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action. A court must determine whether, accepting the facts as alleged in the complaint as true and according to the plaintiff the benefit of every favorable inference, those facts fit within any cognizable

(Continued on page 25)

INSIDE THE COURTS

Reporter Not Required to Testify in Colorado Shooting Case

By Hon. Stephen L. Ukeiley

In 1786, Thomas Jefferson recognized the significance of having a free press when he stated "[o]ur liberty depends on the freedom of the press, and that cannot be limited without being lost." More than two centuries later, the question of a reporter revealing confidential news sources grabbed the headlines in the aftermath of the 2012 Aurora, Colorado movie shooting which resulted in the senseless deaths of a dozen people and an additional 70 wounded.

Shortly following the shootings, New York's Fox News reporter Jana Winter, citing unnamed "law enforcement sources," reported that the defendant James Holmes mailed to his therapist gruesome details of the diabolical plot. The reference to law enforcement sources was curious because the Arapahoe County (Colorado) District Court Judge had previously issued a gag order in the case (*In re Holmes*, 110 A.D.3d 134 (App. Div., 1st Dep't Aug. 20, 2013) (Saxe, J., dissenting)). The defense claimed leaking the information warranted sanctions against the prosecution, and counsel further requested a hearing in which the reporter would have to reveal her sources.

Stephen L. Ukeiley

Although a hearing was scheduled in the Colorado case, Ms. Winter refused to appear. A lengthy legal challenge ensued in New York to determine whether the New York resident was required to appear in Colorado.

Securing witnesses in criminal cases

New York Criminal Procedure Law § 640.10 sets forth the procedures for directing the appearance of out-of-state witnesses in criminal cases pending within and outside New York. Typically, a civil proceeding is commenced and the cooperation of judges of both states is required to make the appearance compulsory.

In *Holmes*, a civil proceeding was commenced in New York State Supreme Court to enforce a Colorado subpoena directing the reporter's appearance. Pursuant to CPL § 640.10(2), a New York resident may be required to testify in a criminal proceeding in another state where the judge in the requesting state certifies that the individual is a material witness.

The statute further requires that the New York court conduct a hearing to determine whether (1) the witness is material and necessary to the out-of-state prosecution and (2) if the appearance would result in "undue hardship" to the witness.

If satisfied, the New York judge may, upon request of the requesting state, have the witness taken into custody and immediately brought to that state. Otherwise, the witness is given a date and time to appear and is reimbursed at a rate of $.10 for each mile traveled and $5 per day. Noncompliance may result in prosecution in New York.

Compulsion would constitute a violation of New York Public Policy

Both the New York trial court and Appellate Division held that Ms. Winter was required to appear in the Colorado proceeding because her testimony is material and necessary to an ongoing criminal proceeding in that state. Moreover, the courts explained that there would be no "undue hard-

(Continued on page 26)

Bench Briefs (Continued from page 4)

legal theory. Whether a plaintiff can ultimately establish its allegations is not part of the calculus.

In the case at bar, the court found that the complaint set forth sufficient facts to state a cause of action for recovery of a real estate broker's commission. A real estate broker is generally entitled to recover a commission upon establishing that he or she (i) was duly licensed, (ii) had a contract, express or implied, with the party to be charges with paying the commission, and (iii) procured a buyer ready, willing and able to purchase on the seller's terms. Absent an agreement to the contrary, the broker's right to a commission is not contingent upon performance of the underlying real estate contract, receipt by the seller of the sale price, transfer of title or even the formal execution of a legally enforceable sales contract. To the extent the complaint may be said to lack specificity as to what the plaintiffs did to procure the potential buyers, it is nevertheless sufficiently to give adequate notice of the transactions and occurrences constituting the alleged wrong. Accordingly, the motion was denied.

Motion to renew granted; a reasonable explanation was offered for defense counsel's inadvertent omissions on the prior motions; upon renewal, motion to dismiss for lack of personal jurisdiction denied; bare and unsubstantiated statements were insufficient to require a hearing to determine whether the defendant was properly served with process.

In *Lyle Pike v. Elsa Soyars,* Index No.: 28794/2013, decided on May 18, 2015, the court granted the branch of defendant's motion, which sought renewal of the motion to dismiss based upon lack of personal jurisdiction. In rendering its decision, the court noted that by order dated January 17, 2014, the court denied defendant's dismissal motion based upon the absence of the summons and complaint and an affidavit regarding personal jurisdiction. By order dated June 30, 2014, the court denied, without prejudice, leave to renew the dismissal motion based upon the defendant's failure to include with her motion papers copies of the original moving and opposing papers.

Defendant now moved for leave to renew. In granting the application, the court noted that while renewal must be denied when the moving party failed to present a reasonable justification for not submitting the additional evidence on the previous motion, law office failure could be accepted as a reasonable excuse in the exercise of the court's discretion. Here, the court found that a reasonable explanation was offered for defense counsel's inadvertent omissions on the prior motions, and there had not been a showing of any prejudice to the plaintiff due to such omission.

Upon renewal, the branch of the motion seeking dismissal of the complaint for lack of personal jurisdiction was denied. In denying the motion for dismissal, the court stated that the affidavit of plaintiff's process server averred that substituted service was effectuated by delivery at defendant's residence to a person of suitable age and by mailing the summons by first class mail to the defendant at her residence in an envelope bearing the legend, "personal and confidential" six days later.

In her affidavit in support of her motion, the defendant alleged that she was not served with the summons and verified complaint in this action via personal service, by deliver of the summons and/or verified complaint to a person of suitable age and discretion, by delivery of the summons to my agent, or by having the summons affixed to my door. She further alleged that she received the summons and complaint via first class mail and not by other means. Contrary to the assertions by defense counsel, the court determined that such bare and unsubstantiated statements were insufficient to require a hearing to determine whether the defendant was properly served with process.

Honorable William B. Rebolini

Motion for summary judgment denied; no duty to warn because it did not manufacture, supply or place into the stream of commerce the asbestos-containing materials that were used in its boilers; questions of fact existed.

In *Todd Tuthill and Dawn Tutill v. A.O. Smith Water products Co., American Biltrite, Inc., Aurora Pump Co., Bell & Gossett Co., Blackmer, a Division of Dover Corp., f/k/a Blackmer Pump Power & Manufacturing Co., Borge-Warner Corp., by its s/i/i Borg-Warner Morse Tec, Inc., Burnham Corp., Carrier Corp., Indiv. And as s/i/i to Byrant Heating & Cooling Systems, CBS Corp f/k/a Viacom Inc., s/b/m to CBS Corp., f/k/a Westinghouse Electric Corp., Cleaver Brooks Co., Inc., Crown Boiler Co. of Pottstown Crane Co., Crown Boiler Co., f/k/a Crown Industries, Inc., Dunham-Bush, Inc., Eaton Corp., as s/i/i to Cutler-Hammer Inc., Foster Wheeler, LLC, General Electric Co., Georgia Pacific, LLC, Goodyear Canada, Inc., Gould Electronics, Inc., Gould Pumps, Inc., H.B. Fuller Co., Honeywell Int'l, Inc., f/k/a Allied Signal, Inc./Bendix, Ingersoll-Rand Co., ITT Corp., J.H.France Refractories Co., Jenkins Valves, Inc., Kentile Floors Inc., Kohler Co., Lennox Indus., Inc., OakFabco, Inc., Owens-Illinois, Inc., as s/b/m to Allen-Bradley Co., LLC, Roper Pump Co., Schneider Electric USA, Inc., Siemens Indus., Inc., s/i/I to Siemens Energy & Automation, Inc., Slant/Fin Corp., The B.F. Goodrich Co., The Fairbanks Co., The Goodyear Tire and Rubber Co., Trane U.S., Inc. f/k/a American Standard Inc., U.S. Rubber Company (Uniroyal), United Conveyor Corp., Utica Boilers, Inc., indiv. And as successor to Utica Radiator Corp., Weil-McLain, a division of The Marley-Wylain Co., a wholly owned subsidiary of The Marley Co., LLC, Yarway Corp,* Index No.: 2272/2012, decided on December 29, 2014, the court denied the motion of defendant, Crane Co., for summary judgment. In rendering the decision, the court noted that this was an action to recover damages for personal injuries allegedly sustained by the plaintiff as a result of his exposure to asbestos contained in products sold and manufactures by the defendants. The plaintiff worked as an electrician and heating technician from the 1970's through the 1990's. As part of his work, the plaintiff serviced boilers and furnaces primarily in residential locations. This included removing old equipment and installing new boilers and furnaces. Here, the moving defendant contended that it had no duty to warn because it did not manufacture, supply or place into the stream of commerce the asbestos-containing materials that were used in its boilers. Moving defendant also claimed that it did not direct or advise its customers regarding the types of materials to be used. In opposition, the plaintiff submitted numerous manuals and brochures indicating that the moving defendant recommended the use of asbestos insulation with its boilers. Under the circumstances of the case, the court concluded that questions of facts existed that precluded summary judgment.

Please send future decisions to appear in "Decisions of Interest" column to Elaine M. Colavito at elaine_colavito@live.com. There is no guarantee that decisions received will be published. Submissions are limited to decisions from Suffolk County trial courts. Submissions are accepted on a continual basis.

Note: Elaine Colavito graduated from Touro Law Center in 2007 in the top 6% of her class. She is an Associate at Sahn Ward Coschignano & Baker, PLLC in Uniondale, a full service law firm concentrating in the areas of zoning and land use planning; real estate law and transactions; civil litigation; municipal law and legislative practice; environmental law; corporate/business law and commercial transactions; telecommunications law; labor and employment law; real estate tax certiorari and condemnation; and estate planning and administration. Ms. Colavito concentrates her practice in matrimonial and family law, civil litigation and immigration matters.

Losing the "S" Election (Continued from page 21)

and drainage systems as well as roofing, landscaping and building improvements. The services also included daily security services and management and control of all common areas, including parking lots and picnic table areas. Corp additionally negotiated and executed leases with tenants, settled tenant disputes and collected rents and monthly sales reports, negotiated bank loans and insurance contracts for the Property and performed background checks on prospective tenants.

The IRS stated that the term "passive investment income" means gross receipts derived from royalties, rents, dividends, interest, annuities, and sales or exchanges of stock or securities.

It also noted that IRS regulations provide that "rents" does not include rents derived in the active trade or business of renting property. According to the IRS, rents received by a corporation are derived in an active trade or business of renting property only if, based on all the facts and circumstances, the corporation provides significant services or incurs substantial costs in the rental business. Generally, significant services are not rendered and substantial costs are not incurred in connection with net leases.

Whether significant services are performed or substantial costs are incurred in the rental business is determined based upon all the facts and circumstances including, but not limited to, the number of persons employed to provide the services and the types and amounts of costs and expenses incurred.

Based solely on the description of Corp's activities above, the IRS concluded that the rental income that Corp received from its operations was not passive investment income that would trigger the imposition of the tax.

The IRS also added, as an aside, that the S corporation rules considered in the ruling (and described above) are independent of the passive activity rules [IRC Sec. 469]; unless an exception under those rules applied, the rental activity would remain passive for purposes of those rules notwithstanding the conclusion that they were not passive for purposes of the for S corporation tax.

What's an S Corp to do?

What if Corp's rental activity had been treated as passive under the S corporation rules? What if not all the shareholders consented to elect to an E&P distribution? In those cases, the S corporation must monitor its active and passive receipts. It may have to reduce its receipts from passive investment income, or it may have to increase its receipts from an active trade or business (perhaps by investing in such a business through a partnership), so as not to run afoul of the 25 percent threshold.

What is certain is that the S corporation and its shareholders cannot simply ignore the issue and hope that it is never discovered.

Note: Lou Vlahos, a partner at Farrell Fritz, heads the law firm's Tax Practice Group. Lou can be reached at (516) 227-0639 or at lvlahos@farrellfritzcom.